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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Implement the Commission's Procurement Incentive Framework and to Examine the Integration of Greenhouse Gas Emissions Standards into Procurement Policies.	Rulemaking 06-04-009 (Filed April 13, 2006)

**ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION
OF THE STATE OF CALIFORNIA**

In the Matter of: AB 32 Implementation: Greenhouse Gases	Docket 07-OIIP-01

REPLY COMMENTS OF THE LOS ANGELES DEPARTMENT OF WATER AND POWER ON THE ADMINISTRATIVE LAW JUDGES' RULING REQUESTING COMMENTS AND LEGAL BRIEFS ON MARKET ADVISORY COMMITTEE REPORT

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In accordance with Rule 14 of the Rules of Practice and Procedure of the Public Utilities Commission ("CPUC" or "Commission") of the State of California, the Los Angeles Department of Water and Power ("LADWP") hereby files the following Reply Comments submitted in response to the "Administrative Law Judges' Ruling Requesting Comments and Legal Briefs on Market Advisory Committee Report," filed July 19, 2007, and "Administrative Law Judges' Ruling Requesting That Parties Address An Additional Legal Issue In Their Reply Briefs, Due August 15, 2007," filed August 8, 2007, in CPUC Rulemaking R.06-04-009 ("Rulemaking") and CEC Docket # 07-OIIP-1.

I. INTRODUCTION

The LADWP supported Assembly Bill 32 as legislation and continues to support the State's efforts to effectively reduce greenhouse gas (GHG) emissions as stakeholders and regulators work together through the rulemaking process. The LADWP recognizes the benefits of the first-seller approach as a source-based point of regulation for in-state sources. However, our concerns regarding the first-seller focus primarily on its application to electricity imports.

The LADWP has reviewed the opening comments of other parties. At this time, the LADWP is not convinced that the first-seller approach to the point of regulation for AB 32 is *overall* superior to the load-based approach. It appears from the opening comments from several parties that there are significant concerns about the effectiveness of a load-based point of regulation. If these concerns are legitimate, then the LADWP recommends that the discussion be expanded to include investigation of any other alternatives and not necessarily position this discussion as an "either/or" discussion that limits consideration to only one alternative, the first-seller. Technical, legal and regulatory issues regarding implementation of any regulatory structure must be adequately addressed to fully appreciate both their strengths and weaknesses in terms of attaining AB 32's overall goal of reducing California's GHG emissions to 1990 levels.

The entity which is the point of regulation has the direct compliance obligation under AB 32, and the potential impacts of any approach must be considered in the context of several other elements of AB 32 that are not yet fully defined. As such, the point of regulation must be considered in the context of the overall emission reduction goal by 2020, the sector specific emission reduction goals, and most importantly how emission allowance allocations are distributed to entities – all of which are still "in motion" and not final.

LADWP's key concerns specific to the first-seller approach can be summarized as follows:

- The first-seller approach unnecessarily complicates the regulatory scheme for electricity imports.
- The first-seller approach cannot be evaluated in isolation of other key program elements, such as allowance allocation.
- The first-seller point of regulation for marketers is problematic.
- The first-seller may be more susceptible to legal challenges than a load-based approach.
- Reliance on NERC e-tags for purposes other than reliability is problematic.
- Unspecified electricity imports are greater in the NW and could lead to gaming and market manipulation if NERC e-tags are used for source tracking.

- The first-seller approach does not provide for the full array of emission reduction tools that are available under a load-based approach, such as energy efficiency.

II. REPLY COMMENTS

A. *Interaction with Energy Markets*

It was argued that there will be an improved "line of sight" from the first seller approach for electricity imports, because emissions would not need to be tracked from the point of delivery into California to the RSP where it is ultimately consumed. Upon closer examination, though, we see that under a NERC e-tag verification scenario, the only "line of sight" difference between the load-based and first-seller approaches for electricity imports is that with the load-based approach, the RSP also sees the upstream marketing path between itself and the first-seller. Under a first-seller approach the in-state tracking would not be necessary. However, the "line of sight" for electricity imports is not significantly clearer than under a load-based approach for the portion of the transaction that is upstream between the first-seller and the actual generation source that was dispatched. This part of the contractual arrangement still remains disconnected from information available on a NERC e-tag.

From a wholesale marketing perspective, the LADWP believes that both the first-seller and load-based approaches are untested and each have weaknesses in terms of electricity imports. Our concerns regarding the first-seller approach stem from how it might be implemented. One of these concerns lies with California RSPs potentially receiving no-cost carbon credits under an allowance allocation methodology for a portion of imported energy for which they are not the point of regulation. Another concern involves a key feature of the first-seller approach -- namely, the potential for using NERC e-tags for purposes other than ensuring reliability of the transmission grid, such as source tracking, that can inadvertently create the incentive for market manipulation and gaming.

If the goal of this discussion is to identify a better means of transition to a regional or federal program, there may be other approaches that more effectively achieve that goal, such as the California Air Resources Board (CARB) proposed reporting protocols that establish a dual reporting framework that captures in-state emissions data from both the generator and the RSP. The LADWP recommends that the State of California aggressively pursue expansion of a GHG source tracking registry that builds upon a program such as Western Renewable Energy Generation Information System (WREGIS) to accurate identify the GHG emissions associated with generators, and abandon efforts to use NERC e-tags for purposes other than reliability. Until such time that Western regional or national GHG regulations cover all the generation sources in the WECC that export electricity into California, leakage and contract shuffling will continue to be a concern in a California-only law, regardless of the point of regulation (load-based or first-seller). We agree with SCE's sentiment that "both approaches are novel and legally untested", and we suggest that the CPUC/CEC and CARB more fully develop the logistics of carbon content regulation before we can fully endorse any approach.

B. *Reporting, Tracking, and Verification*

Some parties stated that source tracking would be more accurate based on information provided on NERC e-tags. LADWP does not agree with this based on our direct experience with NERC e-tags as a balancing authority and a participant in the wholesale electricity markets. LADWP, in its capacity as a Balancing Authority, which is similar to the authority vested in the CAISO, values NERC e-tags as a tool to manage transmission grid reliability. However, that value is limited to that function. NERC e-tags may identify the Purchasing/Selling Entity (PSE) that is the first-seller of electricity delivered into California. The incorrect tendency is to then assume that the first point of receipt (POR) listed on the physical path is the true source of generation. However, any other information on that same NERC e-tag bears no correlation to the actual generation source that was dispatched that allowed that transaction to occur.

LADWP believes that NERC e-tags, if used for purposes other than reliability, have the potential to be manipulated to reflect a generation source that is desired to support a particular transaction (whether low-GHG or high-GHG source). The NERC e-tag is an inadequate tool for source/emission tracking, because the entity that generates the tag has discretion in how an energy transaction is e-tagged for reliability purposes after it is negotiated. Under a GHG regulatory scenario, the RSP with the compliance burden that is buying energy will want assurance that transactions that are negotiated between two parties reflect the resources that are dispatched in order to avoid double-counting of low-GHG resources and under-counting of high-GHG resources between the entities. The NERC e-tag does not serve this purpose adequately.

The LADWP believes that in order to maintain environmental integrity of a GHG reduction program, the source tracking system must be WECC-wide and be designed for the specific purpose of source tracking. Any implied accuracy in source tracking through the use of NERC e-tags is incorrect and would undermine the efforts of California to affect real GHG emission reductions from the electricity sector.

C. *GHG Emissions Allowance Allocation Issues*

PG&E's recommendations regarding the distribution of allowances do not adequately address the potential for under- and over-allocation of allowances to RSPs. This approach does not take into consideration the actual emissions burden or liability that a party carries as the point of regulation under AB 32. PG&E's approach results, by default, in a two-step process where 1) California RSPs receive free allocation of allowances although they may not be the point of regulation (do not have to submit allowances to the regulatory agency), then 2) California RSPs then sell their allowances via auction to the first sellers, who are the point of regulation. There is a strong potential that the double allocation approach will shift monetary resources away from utility investments in GHG-neutral electric resources to a carbon market and back to utilities who are not increasing investments at the same rate. In other words, this may result in a regional wealth transfer:

> "PG&E recommends distributing allowances to load serving entities for the benefit of their customers, who ultimately bear a significant share of the costs associated with a cap-and-trade program. The allowances then would be distributed to first sellers as complying entities through an auction or some other approach that ensures that the value of the allowances are available as an offset against the cost of the allowances which customers ultimately pay through their electricity rates. The revenues generated from the auction or other approach would be held for the benefit of load serving entities' customers." (Page 35)

The LADWP understands PG&E's recommendation, based on testimony at the CPUC/CEC Allowance Allocation Workshop held in Sacramento on June 22, 2007 to mean that allowances would first be distributed to retail service providers based on their customer sales (MWh) or similar criteria (i.e. total customers served) regardless of the relationship to the compliance requirements and compliance costs.

Existing cap-and-trade programs, such as the U.S. EPA Acid Rain program and the SCAQMD RECLAIM program, allocate allowances based on actual emissions. LADWP recommends that allowances be distributed in a similar way, free distribution based on actual emissions with a declining cap that ultimately results in the reduction of GHG emissions to 1990 levels by 2020. The LADWP is not aware of any existing examples of an allowance allocation scheme that distributes the economic value of an allowance to an entity that is not also the point of regulation, and then places those allowances in an auction for compliance entities to purchase. This approach will likely result in a significant transfer of wealth to RSPs that may carry even less compliance burden under a first-seller approach.

PG&E suggests that allowances be distributed in a way that mitigates costs to consumers, promotes energy efficiency and GHG reduction technologies and promotes early action:

> "PG&E supports the distribution of electric sector C02 allowances to load serving entities to help mitigate the costs of the program on California's electricity consumers, while promoting investment in energy efficiency programs and greenhouse gas reduction technologies, and using an allocation methodology that recognizes early actions." (Page 36)

We support this position in that it promotes investments in GHG reductions as part of AB 32's implementation design. However, the first-seller approach will undercut increased investments in energy efficiency and renewable energy if funds are diverted into an auction first. It is likely that customers served by higher GHG-emitting RSPs will experience greater cost impacts than those customers served by lower GHG-emitting RSPs that have less emission reductions required of them.

Additionally, under a first-seller approach that is combined with PG&E's approach to allowance allocations, an RSP's regulatory burden is reduced to the extent that it relies to a greater degree on the wholesale energy markets to serve native load (i.e., thereby shifting the point of regulation to the first seller). With the shift of that compliance burden away from that RSP, it will have less incentive to reduce load through energy efficiency and demand-side management programs, particular if allowances are distributed based on customer load or sales (i.e. MWh). The more customer load an entity serves, the greater the allowances given to that entity.

Regarding recognition of early action, the LADWP agrees with PG&E that early actions should be recognized. This should include activities that can be documented and verified through third-party certified GHG reporting protocols such as the California Climate Action Registry or equivalent, and that reduce load or emissions that would otherwise not be reflected in an allowance allocation methodology.

PG&E states that "zero-carbon generators are not emitters of GHGs and therefore would not directly receive allocation." (Page 36). The LADWP agrees with and fully supports PG&E's recommendation. LADWP would further recommend that entities not receive allocations for nuclear and large hydro resources "indirectly" either, which would be the case if allowances are distributed based on customer load or sales (i.e. MWh) and ignore an RSP's generation resource mix.

In summary, a two-step process to distribute allowances will result in significant over-allocation to entities based on retail sales and not on GHG emissions (i.e., serves large customer loads, has significantly more nuclear and large hydro in its resource mix, and greater reliance on the wholesale electricity markets to meet native load). Under

PG&E's allowance allocation scheme, smaller utilities could be significantly under-allocated allowances (i.e. smaller customer load, fully resourced, and less reliance on the wholesale electricity market to serve native load). The end result is that a small RSP may be a net buyer of allowances through an auction; the small utility's financial resources would shift away from investments in GHG neutral electricity and into an unknown carbon auction fund.

We agree with Calpine's comments that under a first-seller approach, if RSPs are over allocated allowances, they could control a large portion of the allowance market with very little incentive to make them available to the market:

> "If these entities are over allocated allowances, they could control a large portion of the allowance market with little incentive to make those allowances available to the market. Giving a retail provider more allowances than which it would otherwise qualify for as the first seller could reduce liquidity in the allowance market, and thus, reduce the ability of the market to find the most cost effective means for achieving the state's emission reduction goals." (Page 7)

Also, allocating allowances to retail providers and not other entities subject to AB 32 compliance raise serious competitive concerns.

It is LADWP's position that the intent of AB 32 is to realize direct emission reductions, and a cap-and-trade program should play a secondary role in supporting those efforts. A two-step process to distribute allowances does very little to promote GHG emission reductions that are needed for California to reach 1990 GHG emissions levels. Instead, this two-step process obscures the end goal of AB 32 and focuses efforts instead on the shifting of economic value and market designs, and separates the regulatory obligations of entities that will be facing significant cost impacts and emission reductions to meet the 1990 goal.

The LADWP believes that our position that allowances be distributed based on actual generation emissions is consistent with SCE's recommendation that allowances should be distributed to entities based on economic harm:

> "Allowances should be allocated to those entities that would face economic harm from the imposition of GHG rules and that do not have the ability to pass on these costs." (Page 35)

While we support this principle, we do not agree that the point of regulation can be considered independent of the process by which allowances are provided to the market.

LADWP also supports Calpine's comments that, if adopted, an auction approach should contemplate:

> "...a phase-in period that would include the direct allocation of allowances to some sources in order to mitigate potential adverse economic impacts associated with increased capital costs necessary to comply with emission reduction requirements and/or energy contracts that do not contemplate emission reduction costs." (Page 6).

However, LADWP believes that an allocation based on "electricity sales" as stipulated by Calpine does not actually reduce the risk of windfall profits by reducing the potential for over allocation of allowances. This is because electricity sales, as a metric, have no correlation to the emissions burden for entities that are the point of regulation.

LADWP agrees with Calpine that liquidity and transparency are critical to an efficient allowance market. Calpine suggests that under a first-seller approach, RSPs would be subject to the cap-and-trade program for only a small fraction of sales, if at all, because they generally contract for a significant portion of the energy needed to serve their loads. LADWP clarifies that while this may be true for California investor owned utilities (IOUs), it is not necessarily the case for municipally-owned/publicly-owned utilities (POUs) that would also be subject to AB 32 compliance. Most POUs are vertically integrated and fully resourced to meet their native load. In the case of LADWP, our participation in short-term wholesale transactions is done for economic purposes when it is more costly to operate generation resources than it is to purchase energy through wholesale electricity markets.

III. LEGAL ISSUES

The following reply comments briefly address supplemental Question 54 presented in the Administrative Law Judges' Ruling dated August 8, 2007 and certain opening comments filed by other stakeholders on August 6, 2007.

1. *Supplemental Question 54*

To what degree, if any, does the following line of cases suggest that a deliverer/first seller approach is more likely than a load-based approach to be subject to preemption under the Federal Power Act? *Northern Natural Gas Co. v. Kansas,* 372 U.S. 84 (1963); *Transcontinental Gas Pipe Line Corp. v. Mississippi,* 474 U.S. 409 (1986); *Northwest Central Pipeline Corp. v. Kansas,* 489 U.S. 493 (1989). Please consider these cases in light of *Calif. ex rel. Lockyer vs. Dynegy, Inc.,* 375 F.3d 831, 842 n.8 (2004) (finding that the Federal Power Act and Natural Gas Act are similar statutory schemes and therefore case law for the two acts is often interchangeable). Please provide a detailed analysis.

Answer: The cases cited in this question concern the reach of federal jurisdiction over wholesale transactions in natural gas and electricity in interstate commerce. The cases make clear that the federal jurisdiction over wholesale transactions is exclusive and extends to matters in addition to price. They thus furnish additional support for the proposition that the first deliverer/seller approach is more vulnerable to Federal Power Act preemption because it directly regulates interstate wholesale transactions.

It is correct, as noted in *California ex rel. Lockyer v. Dynegy, Inc.,* 375 F.3d 831

(2004), that the authorities under the Federal Power Act ("FPA") and the Natural Gas Act ("NGA") are relied on interchangeably in cases where the two Acts contain materially parallel provisions. *See Fed. Power Comm'n v. Sierra Pac. Power Co.,* 350 U.S. 348, 353 (1956); *Permian Basin Area Rate Cases,* 390 U.S. 747, 820-21 (1968). The provisions of the Acts concerning federal jurisdiction over wholesale transactions are an example of provisions that are materially parallel.[1]

These jurisdictional provisions both have their roots in a series of early twentieth century Supreme Court decisions limiting, under the Commerce Clause of the federal constitution, the states' ability to regulate interstate transactions involving electricity and natural gas. *See* Nicholas W. Fels & Frank R. Lindh, *Lessons from the California "Apocalypse:" Jurisdiction Over Electric Utilities,* 22 ENERGY L.J. 1, 2 (2001); Frank R. Lindh, *Federal Preemption of State Regulation in the Field of Electricity and Natural Gas: A Supreme Court Chronicle,* 10 ENERGY L.J. 277, 285-86 (1989).

These Supreme Court cases culminated in *Public Utilities Commission v. Attleboro Steam & Electric Co.,* 273 U.S. 83 (1927). That case involved an attempt by the Rhode Island Public Utilities Commission to regulate the rate at which a Rhode Island utility sold electric power at wholesale, effectively across a state line, to a utility in Massachusetts. The Supreme Court found that this regulation of the wholesale transaction places "a direct burden upon interstate commerce, from which the State is restrained by the force of the Commerce Clause . . . ." *Id.* at 89.

Part II of the FPA was enacted in 1935, and the NGA was enacted three years later. Both were intended to "fill the gap" in utility regulation left by the *Attleboro* line of

[1] *See* Federal Power Act § 201(b)(1), 16 U.S.C. § 824(b)(1); Natural Gas Act § 1(b), 15 U.S.C. § 717(b).

cases:

> Part II [of the FPA] is a direct result of *Attleboro.* They are to be read together. The latter left no power in the states to regulate licensees' sales for resale in interstate commerce, while the former established federal jurisdiction over such sales. Discussion of . . . that statute and the Natural Gas Act in recent cases supports this conclusion. Especially in the litigation arising under the Gas Act has this Court expressed the view that the limitations established on Commission jurisdiction therein were designed to coordinate precisely with those constitutionally imposed on the states.

United States v. Pub. Util. Comm'n of Cal., 345 U.S. 295, 311 (1953) (citations omitted).

It has been recognized that the *Attleboro* line of cases does not reflect modern Commerce Clause jurisprudence, where the trend is "to look in every case to the nature of the state regulation involved, the objective of the state and the effect of the regulation upon the national interest in the commerce." *Ark. Elec. Coop. v. Ark. Pub. Serv. Comm'n,* 461 U.S. 375, 392 (1983) (internal quotations omitted). However, that modern trend in Commerce Clause jurisprudence does not change the preemption analysis under the FPA. That is because, as a matter of statutory interpretation:

> What Congress did [in enacting the FPA] was to adopt the test developed in the *Attleboro* line which denied state power to regulate a sale "at wholesale to local distributing companies" and allowed state regulation of a sale at 'local retail rates to ultimate consumers.'

Fed. Power Comm'n. v. S. Cal. Edison Co., 376 U.S. 205, 214 (1964) (emphasis added). *See also Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n,* 461 U.S. 375, 392 (1983).

The principal significance of two of the three NGA cases cited in supplemental Question 54 are their holding that exclusive federal jurisdiction over wholesale transactions extends to matters in addition to rates. *N. Natural Gas Co. v. Kansas,* 372

U.S. 84 (1963) (ratable purchase obligation imposed on interstate pipeline); *Transcont. Gas Pipe Line Corp. v. State Oil & Gas Bd. of Miss.*, 474 U.S. 409 (1986) (same).[2] The third case, *Northwest Central Pipeline Corp. v. Kansas*, 489 U.S. 493 (1989), holds that local regulation relating to natural gas production and not directed at any wholesale transaction is within the authority Congress intended to leave with the states when the NGA was adopted. *Id.* at 496, 510-11.

As is pointed out in the supplemental question, the *Dynegy* decision refers to the interchangeability of FPA and NGA authorities concerning federal jurisdiction. However, the decision also deals with the issue of whether state regulation unrelated to price (state law causes of action) is preempted under the FPA. The decision holds that it is:

> California does not contest FERC's exclusive jurisdiction over interstate wholesale power rates; rather, it urges that such authority does not extend over every aspect of the wholesale market. . . .
>
> . . . .
>
> We cannot agree with California's theory . . . , our cases specifying the nature and scope of exclusive FERC jurisdiction make clear that interstate "transmission" or "sale" of wholesale energy pursuant to a federal tariff -- not merely the "rates" -- falls within FERC's exclusive jurisdiction. . . . [W]e have enunciated a bright-line distinction between wholesale sales, which fall within FERC's plenary jurisdiction, and retail sales, over which the states exercise jurisdiction.

Cal. ex. rel. Lockyer v. Dynegy, 375 Fd.3d 831, 850-51 (2004) (citation omitted).

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[2] While the preemptive effect of the holdings in *Northern Natural* and *Transcontinental* remain effective, elements of the former wholesale gas-price regulatory regime have been changed by legislation enacted subsequent to these rulings. Natural Gas Wellhead Decontrol Act of 1989, Publ. L. No. 101-60, 103 Stat. 157 (1989). *See generally,* Pipeline Service Obligations and Revisions to Regulations Governing Self-implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 Fed. Reg. 13,267-02, 13,281 (April 16, 1992), Order on Reh'g, 57 Fed. Reg. 36,128-01, 36,171 (August 12, 1992).

In short, federal regulation of the wholesale transactions goes well beyond pricing issues. Even sales of power made at "market-based rates" (with blanket exemptions and authorizations in force as to securities, accounting, and cost-based reporting matters) are subject to anti-manipulation, market-conduct, mitigation and market-power screens and requirements and to ongoing disclosure and transaction requirements.[3] FERC regulation of wholesale power attaches to all aspects of a jurisdictional seller and a jurisdictional transaction, and not simply to price. The first seller approach would introduce state regulation into this fully federally-occupied field.

2. Preemption Analysis of the First Seller Approach

The opening comments of a number of the parties argue that the FPA leaves room for state regulation of the wholesale transaction in interstate commerce when the regulation is aimed at protection of the environment.[4]

LADWP agrees that environmental protection is a proper state purpose and likely not preempted when accomplished by load-based regulation.[5] However, the analysis of the first seller approach is different because it directly regulates the wholesale

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[3] *See generally*, Market-Based Rates for Sales of Electric Energy, Capacity, and Ancillary Services by Public Utilities, 119 F.E.R.C. P61,295 (2007).

[4] *See e.g.*, Comments of Pacific Gas and Electric Co. (U 39 E) on Market Advisory Committee Recommendation of "First Seller" Regulation of Greenhouse Gas Emissions Under AB 32, Att. 1 ("Brief of PG&E") at 1-5, Rulemaking 06-04-009 (Aug. 6, 2007)

[5] In *Northwest Central Pipeline Corp. v State Corp. Commission. of Kansas,* 489 U.S. 493 (1989), the Supreme Court upheld state regulation of natural gas production against a preemption challenge under the FPA. The Kansas Corporation Commission had "dismissed this challenge, distinguishing *Northern Natural* because the rule there at issue had directly regulated purchasers; . . . on the other hand, . . .[the challenged order of the corporations commission] does not require pipelines purchasers to do anything or refrain from doing anything. . . . [D]espite the new order's probable consequences for pipeline purchasing practices and price structures, the District Court held that it fell within the production and gathering exemption of NGA §1(b), because it was directed to gas producers, . . . The Kansas Supreme Court affirmed on the same ground. It [held] the rules on underages are part of production regulation and thus are not violative of the [NGA], even though purchasers are indirectly caught in the backwash." *Id.* at 507-08 (citation omitted).

transaction. As far as LADWP is aware, the authorities are uniform in holding that state regulation of the wholesale transaction is completely preempted:

> [O]ur decisions have squarely rejected the view . . . that the scope of FPC jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, . . . This was done in the Power Act by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.

Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 215-16 (1964).[6]

Thus, FERC has exclusive jurisdiction over interstate wholesale electricity sales unless Congress has explicitly authorized state regulation. There is, of course, no such authorization here. No provision in the FPA explicitly allows California to require the seller in a wholesale transaction to surrender an allowance or face a penalty. Because the first seller/deliverer approach would directly regulate interstate wholesale transactions, an area within FERC's exclusive jurisdiction, it is more vulnerable to preemption. The authorities cited by LADWP and others in their opening comments recognizing the authority of the state to regulate the portfolio mix of an RSP or impose

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[6] *See also Ill. Natural Gas Co. v. Cent. Ill. Pub. Serv. Co.,* 314 U.S. 498, 507 n.1 (1942) (quoting the report of House Committee on Interstate and Foreign Commerce concerning the NGA: "There is no intention in enacting the present legislation to disturb the States in their exercise of [jurisdiction over retail sales]. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See . . . *Public Utilities Commission v. Attleboro Steam & Electric Co. . . .*) The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act."); *Schneidewind v. ANR Pipeline Co.,* 485 U.S. 293, 305 (1987) ("The authorities on which respondents rely state only what is now well settled: Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce.").

environmental controls on other in-state activity say nothing to the contrary. The point of regulation in those cases is not the wholesale transaction, which is exclusively within the plenary jurisdiction of the FERC.[7]

PG&E relies on a case involving the Public Utility Regulatory Policies Act of 1978 ("PURPA") as support for its position that environment-related regulatory action by the state would not be jurisdictionally offensive under the FPA.[8] The case does not stand for that proposition.

PURPA was designed, in substantial part, to encourage the development of higher-efficiency and small, alternative-fuel electric generating facilities.[9] Central to PURPA is Section 210,[10] which in pertinent part expressly directs the FERC to exempt PURPA "Qualifying Facilities" ("QFs") "in whole or part from the Federal Power Act, from the Public Utility Holding Company Act, from State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, or from

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[7] PG&E's opening comments, in particular, ignore this distinction. The Supreme Court cases cited at fn. 2 in PG&E's response to the ALJs' legal questions (Brief of PG&E, at 2 n.2) both involve federal statutes that were claimed as the basis for preemption of local regulation but which were found by the Court, as a matter of statutory interpretation, not to reach the subjects of the state regulation. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 501-02 (1996) ("These state requirements therefore escape pre-emption, not because the source of the duty is a judge-made common-law rule, but rather because their generality leaves them outside the category of requirements that § 360k envisioned to be 'with respect to' specific devices such as pacemakers. As a result, none of the Lohrs' claims . . . are pre-empted by the MDA."); *Pac. Gas & Elec. v. Energy Res. Comm'n*, 461 U.S. 190, 216, 222-23 (1983) ("Accordingly, the statute lies outside the occupied field of nuclear safety regulation."). The FPA is of course different. As discussed above, it has repeatedly been held to completely preempt state authority over all aspects of the wholesale transaction.

[8] Brief of PG&E, at 2.

[9] *See generally*, Revised Regulations Governing Small Power Production and Cogeneration Facilities, 71 Fed. Reg. 7852 (Feb. 15, 2006), Order on Reh'g, 115 F.E.R.C. P61,225 (2006).

[10] 16 U.S.C. § 824a-3.

any combination of the foregoing."[11]

The FERC has done exactly that in its regulations.[12] However, the FERC's exemption authority only reaches those particular statutory schemes which the Congress identified; environmental laws were not among them. The PURPA exemption system has no parallel under the FPA.

PG&E construes these exemptions from corporate, finance, and ratemaking laws -- imposed at the explicit direction of the Congress -- to mean that all environmental laws, whether or not directed only to PURPA generators, may freely occupy the same subject-matter as the FPA. Neither PURPA nor the FERC's PURPA exemption regulations support PG&E's conclusion.

The implication of PG&E's position is that California may regulate any feature of power sales, other than wholesale power prices per se. That position is contrary to the FPA, would expose otherwise-lawful state regulatory goals to Federal rejection on preemption grounds, and would ultimately frustrate the State of California's achievement of environmental gains.

3. Dormant Commerce Clause

For the reasons stated in its opening comments, LADWP is opposed to any auction of allowances if it would divert resources that DWP requires in order to lower the emissions profile of its generating resources. Some parties (PG&E for instance) have suggested that an auction of allowances allocated to the RSPs in the first instance would not have this effect because the auction proceeds would be returned to the RSPs

[11] *Id.* § 824a-3(e).

[12] 18 C.F.R. § 292.601 *et seq.*

to be held in trust by them for the benefit of their ratepayers. This would make the auction largely pointless in the case of vertically integrated RSPs such as DWP. Nevertheless, to avoid resource diversion, that is the structure LADWP would favor if an auction is in fact required.

In its opening comments, PacifiCorp states: "If California were to direct revenues from GHG allocation sales to in-state first sellers, in essence returning to them some of their own payments for such GHG allowances, that would discriminate against out-of-state first sellers, who had to purchase GHG allowances, but got none of such payments back through "assistance" from California.[13] LADWP agrees, that at least in certain cases, this might be true.

If the discrimination posited by PacifiCorp does in fact occur, it could well be viewed as the type of discrimination which is typically held *per se* unconstitutional under the Dormant Commerce Clause. *See W. Lynn Creamery, Inc. v. Healy,* 512 U.S. 186, 194 (1994) ("Massachusetts' pricing order is clearly unconstitutional. . . . The 'premium payments' are effectively a tax which makes milk produced out of State more expensive. Although the tax also applies to milk produced in Massachusetts, its effect on Massachusetts producers is entirely . . . offset by the subsidy provided exclusively to Massachusetts dairy farmers. Like an ordinary tariff, the tax is thus effectively imposed only on out-of-state products.").

[13] Opening Comments of PacifiCorp at 14.

4. Clean Air Act

In its opening comments, LADWP observed that, under *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007), it is likely that stationary source GHG emissions will be regulated as pollutants by EPA under the Clean Air Act. LADWP further observed that, if that happens, the Clean Air Act could preempt states from applying their own controls on out-of-state sources, except through participation in the federal permit procedure for the out-of-state source. In LADWP's view, the risk on this issue is higher under the first seller approach because it more directly regulates out-of-state interests.

Shortly after LADWP's comments were filed, there appeared a report of a statement by an EPA official that EPA "is considering whether the Supreme Court's ruling authorizing regulation of greenhouse gas emissions from automobiles may also require the agency to regulate stationary sources."[14] That confirms that the Commissions should consider seriously the increased risk of Clean Air Act preemption under the first seller approach.

[14] *EPA Eyes NSR Rules For Greenhouse Emissions From Stationary Sources*, Carbon Control News, Aug. 9, 2007, *available at:* http://carboncontrolnews.com. A copy of this report is attached.

IV. CONCLUSION

The LADWP appreciates the opportunity to provide these reply comments to the CPUC and CEC for your consideration.

Dated: August 15, 2007 Respectfully submitted,

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EPA Eyes NSR Rules For Greenhouse Emissions From Stationary Sources

Posted August 9, 2007

AUSTIN, TX—EPA is considering whether the Supreme Court's ruling authorizing regulation of greenhouse gas emissions from automobiles may also require the agency to regulate stationary sources, a top agency official says.

Jason Burnett, an EPA associate deputy administrator working on climate change and clean energy issues, told the Texas Environmental Superconference here Aug. 2 that the agency's ongoing review of the Supreme Court's April 2 ruling includes consideration of the "ramifications" of the ruling on the NSR program, which requires new and modified facilities located in polluted areas to install the latest controls.

Burnett said in a talk on EPA's climate work that the agency continues to study what the high court's decision in *Massachusetts v. EPA* "means for the rest of the Clean Air Act."

This work includes assessing the ruling's impact on NSR, as well as the prevention of significant deterioration (PSD) program, which is a less-stringent version of NSR that applies to facilities located in areas that meet national ambient air quality standards.

While many observers suggested that the high court's ruling could force the agency to regulate carbon dioxide (CO2) under NSR, Burnett's comments appear to be the first instance that an official has confirmed the agency is considering the issue.

EPA has not publicly revealed any plans to regulate stationary sources of CO2 but Administrator Stephen Johnson has made clear his intent to propose rules to reduce greenhouse gases from automobiles by the end of the year.

One informed source says "the instant" EPA issues its automobile GHG proposals, that will put a legal burden on the agency to regulate stationary sources as well. The source says the Clean Air Act requires that whenever the agency regulates a pollutant from one type of emission source—for example, cars—it must consider regulating that pollutant for all other sources.

It is not clear whether the law would also require EPA to regulate the pollutant under other programs, such as those addressing new source performance standards (NSPS). Since the ruling, environmentalists have indicated in litigation that they are seeking to force EPA to include CO2 in pending NSPS measures.

The informed source says EPA is now grappling with two key issues when considering CO2 under NSR/PSD. The first is deciding the threshold of CO2 emissions that would trigger either program, and the second is determining what control technology meets the NSR requirement for lowest achievable emission rate (LAER) and the PSD requirement for best available control technology (BACT).

However, an environmentalist believes the emissions threshold aspect is already settled by the air act, which stipulates that for pollutants already regulated under the statute—including nitrogen oxide and volatile organic compounds—the trigger for NSR is 100 tons per year (tpy) and the PSD trigger varies between 100 and 250 tpy. Major coal-fired facilities generate far greater amounts of CO_2.

Several sources agree that the more contentious issue will revolve around deciding what qualifies as LAER under NSR and as BACT for PSD for the purposes of CO_2 emissions.

Industry observers say the definition could possibly include efforts to increase energy efficiency or use cleaner-burning coal, whereas some environmentalists counter that LAER requires actual greenhouse gas emissions reduction technology.

The informed source adds that some in industry are likely to urge EPA to rule that non-emissions control technology options, such as improvements to energy efficiency or carbon capture and storage, can qualify as LAER/BACT for the purposes of the NSR/PSD program.

Environmentalists however are likely to push for more stringent and direct CO_2 emission controls to qualify as LAER/BACT in any future air permits. Several environmental groups are already pursuing efforts to require CO_2 controls at new coal-fired power plants across the country.

For example, the Sierra Club last month launched what it says is the first federal challenge in front of EPA's Environmental Appeals Board (EAB) to a new coal-fired power plant without CO_2 controls.

EAB issued a July 20 order requesting that EPA's Office of Air & Radiation and Office of General Counsel jointly file a brief addressing the environmentalists' claim that the permit must be remanded because it lacks a BACT CO_2 emissions limit. EPA has until Aug. 24 to respond. The case, *In the Matter of: Christian County Generation, LLC*, challenges a coal gasification permit issued by Illinois.

In a related issue, the informed source says that EPA is likely to soon issue permits for two proposed coal-fired power plants—Deseret in Utah and Desert Rock in New Mexico—without requiring CO_2 controls and without indicating what the agency considers to be BACT for reducing greenhouse gas emissions.

But several sources say that once EPA regulates CO_2 from automobiles, it will have to formally decide what it believes is the best option that qualifies as LAER/BACT for NSR/PSD purposes.

An EPA spokeswoman says that the agency is "examining the effects [of the Supreme Court ruling] on many aspects of the Clean Air Act, including NSR and PSD."—*Anthony Lacey*

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I hereby certify that I have this day served a copy of the attached:

**REPLY COMMENTS OF THE
LOS ANGELES DEPARTMENT OF WATER AND POWER
ON THE ADMINISTRATIVE LAW JUDGES' RULING REQUESTING COMMENTS
AND LEGAL BRIEFS ON MARKET ADVISORY COMMITTEE REPORT**

on all known parties to R.06-04-009 by transmitting an e-mail message with the document attached to each party named in the official service list, updated August 13, 2007. See attached service list. I served a copy of the document on those without e-mail addresses by mailing the document by first-class mail addressed as follows:

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